U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 15-0093 BLA-A

JAMES N. THOMAS Claimant-Petitioner v. CANNELTON INDUSTRIES, INCORPORATED and RAG AMERICAN COAL COMPANY Employer/Carrier-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/18/2015 DECISION and ORDER

Appeal of the Decision and Order of Scott R. Morris, Administrative law Judge, United States Department of Labor.

James N. Thomas, Beckley, West Virginia, *pro se.*

Kevin T. Gillen (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BUZZARD and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals, without the assistance of counsel,[1] the Decision and Order (2012-BLA-5840) of Administrative Law Judge Scott R. Morris denying benefits on a claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2012) (the Act). This case involves a claim filed on August 2, 2011.

After crediting claimant with 37.90 years of underground coal mine employment,[2] the administrative law judge found that the evidence did not establish that the claimant is totally disabled pursuant to 20 C.F.R. §718.204(b)(2). Because claimant failed to establish that he is totally disabled, the administrative law judge found that claimant did not invoke the rebuttable presumption of total disability due to pneumoconiosis provided at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge also found that claimant was not entitled to benefits under 20 C.F.R. Part 718. The administrative law judge, therefore, denied benefits.

On appeal, claimant generally contends that the administrative law judge erred in denying benefits. Employer/carrier responds in support of the administrative law judge's denial of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[4]

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[1] Cindy Viers, a benefits counselor with Stone Mountain Health Services of Oakwood, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Ms. Viers is not representing claimant on appeal. *See Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

[2] Claimant's coal mine employment was in West Virginia. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc).

[3] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis in cases where fifteen or more years of qualifying coal mine employment and a totally disabling respiratory impairment are established. 30 U.S.C. § 921(c)(4); *see* 20 C.F.R. §718.305.

[4] The Director, Office of Workers' Compensation Programs (the Director), initially filed an appeal with the Board, which was assigned Board docket number BRB No. 15-0093 BLA, but he subsequently moved to withdraw his appeal. By Order dated March 25, 2015, the Board granted the Director's motion and dismissed his appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers whether the Decision and Order below is supported by substantial evidence. *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (en banc).

Total Disability

The administrative law judge correctly noted that the two pulmonary function studies of record conducted on October 26, 2011 and January 25, 2012, are non-qualifying.[5] Decision and Order at 9-10; Director's Exhibits 10, 26. Consequently, we affirm the administrative law judge's finding that the pulmonary function study evidence does not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i). The administrative law judge next determined that the qualifying blood gas study conducted by Dr. Shamma-Othman on October 26, 2011, and the non-qualifying blood gas study conducted by Dr. Zaldivar on January 25, 2012, were, at best, in equipoise, and therefore, insufficient to establish total disability at 20 C.F.R. §718.204(b)(2)(ii) by a preponderance of the evidence.[6] Decision and Order at 11; Director's Exhibits 10, 26;

Thomas v. Cannelton Indus., Inc., BRB No. 15-0093 BLA and 15-0093 BLA-A (Mar. 25, 2015) (Order) (unpub.).

[5] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the values specified in the tables at 20 C.F.R. Part 718, Appendices B and C. A non-qualifying study exceeds those values. *See* 20 C.F.R. §718.204(b)(2)(i), (ii).

[6] We note the administrative law judge's additional finding that he would give greater weight to the more recent blood gas study results, as pneumoconiosis is a progressive disease. Decision and Order at 11; *but see Adkins v. Director, OWCP*, 958

see Director, OWCP v. Greenwich Collieries [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994). Because substantial evidence supports the administrative law judge's finding that the blood gas study evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(ii), this finding is affirmed.

Because there is no evidence of record indicating that the claimant suffers from cor pulmonale with right-sided congestive heart failure, the administrative law judge properly found that claimant is precluded from establishing total disability pursuant to 20 C.F.R. §718.204(b)(2)(iii). Decision and Order at 11.

In considering whether the medical opinion evidence established total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), the administrative law judge considered the medical opinions of Drs. Shamma-Othman, Zaldivar, and Castle. Dr. Shamma-Othman opined that claimant is "impaired due to hypoxemia at rest." Director's Exhibit 10. However, Drs. Zaldivar and Castle each opined that claimant retains the respiratory capacity to perform his previous coal mine employment. Director's Exhibit 26; Employer's Exhibits 4, 10, 11.

Although the administrative law judge interpreted Dr. Shamma-Othman's opinion as supporting a finding of total disability, he found that her opinion was "vague and conclusory," and not well-reasoned.[7] Decision and Order at 16. The administrative law judge specifically questioned the reliability of the arterial blood gas study results relied upon by Dr. Shamma-Othman to support her diagnosis of hypoxemia at rest. Although

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F.2d 49, 51, 16 BLR 2-61, 2-64 (4th Cir. 1992) (rejecting a "later is better" approach to contradictory x-ray evidence where the later evidence shows an improvement in claimant's condition). We need not address the administrative law judge's finding in this case, given his alternative finding that the two blood gas studies, taken three months apart, were, at best, in equipoise, and therefore, insufficient to carry claimant's burden to establish total disability.

[7] The administrative law judge stated that Dr. Shamma-Othman opined that "[c]laimant cannot perform his prior work because he is impaired due to hypoxemia at rest." Decision and Order at 16. However, the record reflects that Dr. Shamma-Othman did not directly address whether claimant's hypoxemia would prevent him from performing his usual coal mine employment, opining only that claimant is "impaired due to hypoxemia at rest." Director's Exhibit 10. The record also reflects that Dr. Shamma-Othman did not provide an explanation for her opinion that claimant is "impaired" due to his hypoxemia. *Id.*

the resting arterial blood gas study conducted by Dr. Shamma-Othman produced qualifying results, Director's Exhibit 10, the resting arterial blood gas study conducted by Dr. Zaldivar three months later produced higher, non-qualifying, results.[8] Director's Exhibit 26. The administrative law judge noted that Dr. Zaldivar interpreted the results of his blood gas study as normal. Decision and Order at 14; Director's Exhibit 26. The administrative law judge further noted that Dr. Zaldivar addressed the disparate blood gas study results:

> [Dr. Zaldivar] . . . stated that he could not explain the disparity between his test results and Dr. Shamma-Othman's results in the arterial blood gas studies. He could only note that "the blood gas in an obese individual varies depending on the position of the individual." He said "the only thing I can think of aside from making a mistake in the lab result is that they took the test while he was lying down . . . ."

Decision and Order at 15, *quoting* Employer's Exhibit 10 at 28-29.

The administrative law judge found that Dr. Zaldivar's explanation of the arterial blood gas study results was "persuasive and unrebutted." Decision and Order at 20. The administrative law judge, therefore, permissibly discounted Dr. Shamma-Othman's opinion, that claimant suffers from hypoxemia, because it was based upon questionable blood gas study results. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *Siegel v. Director, OWCP*, 8 BLR 1-156 (1985); *Street v. Consolidation Coal Co.*, 7 BLR 1-65 (1984); Decision and Order at 20. Because it is based on substantial evidence, we affirm the administrative law judge's determination that Dr. Shamma-Othman's assessment of the extent of claimant's respiratory impairment is not sufficiently reasoned. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997); *Clark*, 12 BLR at 1-155. Because Dr. Shamma-Othman's opinion is the only medical opinion of record supportive of a finding of total respiratory or pulmonary disability, we affirm the administrative law judge's finding that the medical opinion evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). We, therefore, affirm the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2).

[8] The October 26, 2011 blood gas study revealed a PCO2 value of 36 and a PO2 value of 57. Director's Exhibit 10. The January 25, 2012 blood gas study revealed a PCO2 value of 35 and a PO2 value of 74. Director's Exhibit 26.

In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), an essential element of entitlement, we affirm the administrative law judge's denial of benefits under 20 C.F.R. Part 718,[9] *see Trent*, 11 BLR at 1-27, as well as his finding that claimant did not invoke the Section 411(c)(4) presumption.[10] 30 U.S.C. §921(c)(4); Decision and Order at 8, 20.

[9] In light of our affirmance of the administrative law judge's finding that the evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2), a requisite element of entitlement, we need not address the administrative law judge's consideration of whether the evidence established the existence of pneumoconiosis, or his decision to deny claimant's request for an extension of time in which to submit additional x-ray evidence. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

[10] A review of the record reveals no evidence of complicated pneumoconiosis. Consequently, claimant cannot establish invocation of the irrebuttable presumption that he is totally disabled due to pneumoconiosis under Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3).

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

JONATHAN ROLFE
Administrative Appeals Judge